



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CCO/167048

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**PRELIMINARY RECITALS**

Pursuant to a petition filed July 06, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Milwaukee Early Care Administration - MECA in regard to Child Care, a hearing was held on July 28, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly assessed an overpayment in the amount of \$1,171.71 for the period from June 29, 2014 through October 31, 2014.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Children and Families  
201 East Washington Avenue, Room G200  
Madison, Wisconsin 53703

By: Attorney Nancy Wettersten  
Milwaukee Early Care Administration - MECA  
Department of Children And Families  
1220 W. Vliet St. 2nd Floor, 200 East  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On July 1, 2015 the agency sent the petitioner a Child Care Overpayment Notice stating that she was overpaid \$1,171.71 in child care benefits between June 29, 2014 and October 31, 2014.

3. On July 6, 2015 the Division of Hearings and Appeals received the petitioner's Request for Fair Hearing.
4. The basis for this overpayment was that one of the children's fathers, D.A., was living in the home. Because he was in the home, and not an approved activity, he was available to care for the children, and the petitioner was ineligible for child care benefits.
5. To prove that D.A. was in the home, the agency submitted an e-mail from D.A.'s probation agent stating, "on or about and in between June 2014 to November 2014, [D.A.] resided at [the [REDACTED] address]." (See respondent's exhibit 2, page 142). The [REDACTED] address was the petitioner's address. The agency attempted to follow-up with this probation agent, however, the agent never responded to the agency's further inquiries. The agency also submitted a student enrollment verification form dated October 13, 2014. The form listed the petitioner's children's names. The form was addressed to D.A. at the [REDACTED] address.
6. The petitioner and D.A. testified that D.A. was living at a [REDACTED] address in Milwaukee during the overpayment period. The petitioner admits that D.A. moved in with her in November 2014. She submits that D.A. was properly added to her case in November 2014. To prove that D.A. was living at the [REDACTED] address, the petitioner submitted a [REDACTED] Laboratories bill with the [REDACTED] address. The date of service for that bill was May 19, 2014, however, the statement date was July 25, 2014. The petitioner further submitted an August 18, 2014 IRS notice addressed to D.A. at the [REDACTED] address.

### DISCUSSION

Wis. Stat., §49.195(3), provides as follows:

A county, tribal governing body, Wisconsin works agency or the department shall determine whether an overpayment has been made under s. 49.19, 49.148, 49.155 or 49.157 and, if so, the amount of the overpayment.... Notwithstanding s. 49.96, the department shall promptly recover all overpayments made under s. 49.19, 49.148, 49.155 or 49.157 that have not already been received under s. 49.161 or 49.19(17) and shall promulgate rules establishing policies and procedures to administer this subsection.

Child care subsidies are authorized in Wis. Stat., §49.155, and thus they are within the parameters of §49.195(3). Recovery of child care overpayments also is mandated in the Wis. Adm. Code, §DWD 12.23. An overpayment is any payment received in an amount greater than the amount that the assistance group was eligible to receive, regardless of the reason for the overpayment. Wis. Adm. Code, §DWD 12.23(1)(g). Recovery must occur even if the error was made by the agency.

A parent is eligible for child care services if she needs the care to attend W-2 approved school, to work, or to participate in W-2 activities. Wis. Stat., §49.155(1m)(a); W-2 Manual, §15.2.0. The agency shall recover child care payments if the authorized payments would have been less because the parent was absent from an approved activity while the child was in care. Child Day Care Manual, Chapter 2, §2.3.1.

The moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. By seeking to assess an overpayment against the petitioner, the agency is the moving party. The Department acknowledged the principle laid down in *Hanson* in *Final Decision ATI-40/87198* where Deputy Secretary Richard Lorang ruled on August 17, 1995, that in any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case. In the matter before me, the agency's burden is by the preponderance of the credible evidence.

The state Supreme Court has concluded that uncorroborated, written hearsay alone that is controverted by in-person testimony cannot constitute substantial evidence to support factual findings, and ultimately the decision to terminate benefits. *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, 278 Wis.2d 111, 692 N.W.2d 572. The benefits at issue in *Gehin* were income continuation insurance benefits.

In this case the issue is whether or not D.A. was living in the petitioner's home during the overpayment period. If D.A. was living in the petitioner's home, then the agency correctly assessed an overpayment. If D.A. was actually living at the [REDACTED] address, then the agency incorrectly assessed an overpayment. The burden is the agency to show that D.A. was living with the petitioner during this overpayment. To meet that burden, the agency presented an e-mail from D.A.'s probation agent stating, "on or about and in between June 2014 to November 2014, [D.A.] resided at [the [REDACTED] address]." (See respondent's exhibit 2, page 142). The [REDACTED] address is the petitioner's address. The agency further presented a student enrollment verification form dated October 13, 2014. The form listed the petitioner's children's names. The form was addressed to D.A. at the [REDACTED] address.

In response the agency's evidence both the petitioner and D.A. testified that D.A. was not living with the petitioner during the overpayment period. Rather, he was living at an address on [REDACTED]. They then submitted a [REDACTED] Laboratories bill with the [REDACTED] address. The date of service for that bill was May 19, 2014; however, the statement date was July 25, 2014. The petitioner further submitted an August 18, 2014 IRS notice addressed to D.A. at the [REDACTED] address.

The agency never presented testimony from the probation agent stating how the probation agency knew D.A. was living with the petitioner during the overpayment period. It would have been helpful to know if and when this address was reported to probation and parole, who reported the address, and if there were any home visits conducted during the overpayment period. The agency attempted to inquire with the probation agent, who never responded, and they were unable to present this information.

At this point the agency has presented uncorroborated, written hearsay alone that is controverted by in-person testimony. I cannot sustain a finding of fact that D.A. was living in the petitioner's home during the overpayment period based upon this uncorroborated, written hearsay alone. Under *Gehin* this is not allowed.

I further note that not only is this written hearsay controverted by in-person testimony, the written hearsay is also controverted by additional written hearsay presented by the petitioner. Essentially I have two written hearsay statements showing D.A. is living at the petitioner's address and two additional written hearsay statements presented by the petitioner showing that D.A. is living at the [REDACTED] address. When I combine that evidence with the petitioner and D.A.'s testimony, I find that the agency has not met their burden.

### **CONCLUSIONS OF LAW**

The agency incorrectly assessed an overpayment in the amount of \$1,171.71 for the period from June 29, 2014 through October 31, 2014.

**THEREFORE, it is**

### **ORDERED**

That this case is remanded back to the agency with instructions to rescind this overpayment claim number 9900-42-1189. The agency has 10 days from the date of decision to comply with this order.

## REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

## APPEAL TO COURT

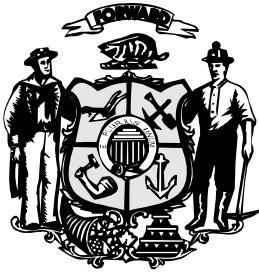
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Children and Families, 201 East Washington Avenue, Room G200, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 2nd day of September, 2015

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\sCorinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on September 2, 2015.

Milwaukee Early Care Administration - MECA  
Public Assistance Collection Unit  
Child Care Fraud  
Attorney Nancy Wettersten